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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEVEN REESE,

Objector and Appellant,

v.

DAVID M. REESE,

Petitioner and Respondent.

B287893

(Los Angeles County  
Super. Ct. No. BP150771)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Thornton House, Judge. Affirmed.

Bennett & Bennett and Kelly A. Bennett for Objector and Appellant.

Jay Oberholtzer and Jay Oberholtzer for Plaintiff and Respondent.

## I. INTRODUCTION

Steven Reese<sup>1</sup> was the administrator of the estate of Leonard A. Reese, his father. David M. Reese was the trustee of the Leonard A. Reese Living Trust of March 23, 2006 (the Trust). David filed a petition with the probate court, pursuant to Probate Code<sup>2</sup> section 17200, subdivision (b)(1), seeking a determination as to whether the sales proceeds from Leonard's property located at 3763 Iroquois Avenue in Long Beach, California (the Iroquois property), should be distributed to David as a beneficiary of the Trust. The probate court granted David's petition and Steven appeals.

Steven contends the petition was barred on the grounds of res judicata and collateral estoppel, citing a previous decision by this Court of Appeal (*Reese v. Reese* (B264733, Jan. 19, 2016) [nonpub. opn.]), and the probate court's prior April 9, 2015, order. Steven also argues that the probate court purportedly applied *Estate of Duke* (2015) 61 Cal.4th 871 (*Duke*) retroactively in error by allowing the introduction of extrinsic evidence regarding Leonard's intent. Alternatively, Steven contends there was insufficient evidence to support the probate court's ruling because Leonard had revoked or modified his Trust. We affirm.

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<sup>1</sup> Several individuals share the same last name. We will use their first names for clarity.

<sup>2</sup> Further statutory references are to the Probate Code.

## II. BACKGROUND

### A. *Procedural History and Factual Background Prior to Pending Appeal*

On October 9, 2001, Leonard executed a living trust. On October 29, 2001, Leonard executed a trust transfer deed, and transferred the Iroquois property to himself as trustee. The trust transfer deed was notarized.

On March 28, 2006, Leonard executed a “Declaration of Trust,” the Trust at issue here. The Trust superseded the October 9, 2001, trust. In the Trust, Leonard named himself as the primary trustee and David as the successor trustee. Article Two, section A of the Trust discussed the plan of distribution upon Leonard’s death: “2. My natural children are DENNIS A. REESE AND STEVEN E. REESE AND DAVID M. REESE. Their share of any inheritance or gift is set forth below. . . . [¶] 3. I direct that my successor trustee divide my personal effects, including automobiles, boats, sporting equipment, jewelry, furniture, furnishings, china, glassware, silver and household equipment . . . among the following named beneficiaries . . . . The named beneficiaries for purposes of this paragraph are: DAVID REESE.” Article Two, section C of the Trust discussed disinheritance in specific detail: “I have consciously not named DENNIS A. REESE AND STEVEN E[. REESE] under the terms of this document. They shall take nothing under the terms of this trust and shall not share in my estate whatsoever.” (Underscore in original.)

On March 28, 2006, Leonard also signed a “Last Will and Testament.” However, the will was witnessed by only one other

person. Plaintiff did not offer the will into probate. Leonard died on November 20, 2010.

On April 1, 2014, David petitioned the probate court to confirm that the Iroquois property was part of the Trust. On April 9, 2015, the probate court granted David's petition, finding the property to be an asset of the Trust. On that same date, the probate court issued its judgment after court trial, which included seven paragraphs.

Paragraphs 1 and 2 of the judgment concluded that the transfer deed was sufficient to create a trust in the Iroquois property. In paragraph 3, the court noted that pursuant to the Trust, Leonard had "consciously not named [Dennis and Steven] under the terms of this document. They shall take nothing under the terms of this trust and shall not share in my estates whatsoever."

Paragraphs 4 through 7 are relevant for purposes of this appeal and we therefore recite the entirety of those paragraphs here:

"4. The Declaration of Trust does not address how real property will be distributed.

"5. The Declaration of Trust does not have a residuary clause.

"6. Since the Declaration of Trust does not address how real property will be distributed And [sic] does not have a residuary clause, the Iroquois property is transferred to the decedent's estate, Los Angeles Superior Court, Central District, case number BP 145751[.]

"7. The Iroquois property passes by intestacy."

David filed a notice of appeal. In his opening brief, David stated that he challenged paragraphs 5 through 7, but not 1

through 4, of the judgment. However, David sought reversal only as to paragraphs 6 and 7. In a nonpublished opinion, this Court of Appeal reversed the April 9, 2015, order as to paragraphs 6 and 7. (*Reese v. Reese, supra*, B264733.) We specifically described the two different portions of the probate court's order: "The probate court found the Iroquois property was an asset of the trust . . . . [¶] This issue is not before us. [¶] The probate court then found the Iroquois property had failed to transfer. The probate court found that the trust had no residuary clause and did not specify how to distribute the real property. The probate court ruled there was a failure to transfer under Probate Code section 21111, subdivision (a)(3). The probate court ruled the Iroquois property should be transferred to Leonard's estate. Because there was no will, the probate court decided the Iroquois property would pass by intestacy." (*Reese v. Reese, supra*, B264733.)

We agreed with David that the probate court had acted in excess of its jurisdiction and reversed the second portion of the probate court's judgment: "Here, plaintiff did not seek a determination as to how the Iroquois property should be distributed. Plaintiff sought only a determination as to whether the Iroquois property [was] a part of the trust. The probate court had no authority to grant relief favorable to Steven, who filed no petition seeking any relief. We express no opinion as to how the Iroquois property should be distributed." (*Reese v. Reese, supra*, B264733.) In the disposition, we stated that "[t]he April 9, 2015 final order is reversed only as to parts<sup>3</sup> six and seven. The order

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<sup>3</sup> The disposition referred to the paragraphs of the order as "parts."

is otherwise affirmed. All parties are to bear their own costs on appeal.” (*Ibid.*)

B. *Section 17200 Petition*

On March 11, 2016, David filed his section 17200 petition to determine entitlement to property and which sought a court order construing the Trust. David noted that “[t]he Trust omits any disposition of its residue,” and requested that the court construe the terms of the Trust to express an intent for David to receive the residue of the Trust and for Steven and Dennis to receive nothing. David asserted that the Trust’s omission of how to dispose of the residue was the result of a mistake by the preparer. David cited in support Leonard’s “Last Will and Testament” dated March 28, 2006,<sup>4</sup> which provided that the residue of Leonard’s estate was to be transferred to “the trustee” of an unnamed trust. David argued that the unnamed trust referenced in the purported will was the Trust at issue.

C. *Petition Hearing*

On August 14 and 15 of 2017, the probate court held a hearing on David’s petition. David, Steven, and Dennis testified.

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<sup>4</sup> David does not dispute this will was not in compliance with section 6110, subdivision (c)(1), as it was witnessed by only one person.

## 1. David's Testimony

David testified that his relationship with his father Leonard had been a "distant" one, until February 2006, when Leonard contacted David and asked David to take care of him until his death. In exchange, Leonard promised to give David his house, his cars, and everything he owned. David agreed. He paid for his father's various bills, drove his father, scheduled his father's appointments, and did whatever his father needed. In early March 2006, Leonard asked David to drive him to a lawyer's office to set up the Trust. Leonard had his long-time neighbor Margaret Miller sign as a witness to the execution of the Trust, and had the document notarized. Leonard was mentally competent at the time he executed the Trust.

In January 2010, Leonard gave David a handwritten note that stated: "Transfer all [¶] [indecipherable] [¶] money to [¶] you [sic] Bank [¶] tell no one [¶] sell this house [¶] sell all [¶] cars[.]" Leonard told David, about once a year, that he was doing a good job and "fulfilling [his] agreement."

Leonard fell in May 2010, and eventually moved into David's home and remained there until his death. David paid for a caregiver for Leonard, using Leonard's funds. Leonard told David that he did not want Steven to have any of Leonard's property.

## 2. Dennis's Testimony

Dennis testified that he spoke with Leonard in late 2006 regarding the disposition of his estate. Leonard told Dennis that neither Steven nor Dennis were recipients under the Trust.

Leonard indicated that he would bequeath all of his assets to David in consideration for David providing Leonard with end-of-life care. Leonard was happy with David's care. Leonard appeared mentally competent when he spoke with Dennis.

### 3. Steven's Testimony

Steven testified that he had not spoken with Leonard since 1999. Steven was unaware of the Trust's existence until he went to a title company sometime before 2013.

#### D. *Statement of Decision*

On December 4, 2017, the probate court issued its statement of decision granting David's petition. The probate court found Dennis and David's testimony that Leonard intended for David to receive all of his property to be credible. The probate court further found that Steven had failed to dispute any of this testimony, because Steven had not communicated with Leonard since 1999.

Pursuant to *Duke, supra*, 61 Cal.4th 871, the probate court admitted extrinsic evidence to correct a clear error in the expression of Leonard's intent. The court rejected Steven's arguments that *Duke* was being applied retroactively to a settled rule of law. The court also rejected Steven's assertion that the prior April 9, 2015, order was final as to the issues raised in David's March 11, 2016, petition, and thus res judicata and collateral estoppel did not apply. The probate court concluded: "the sales proceeds of the Iroquois property are confirmed as an asset of the within Trust as reformed to provide that its entire

residue should be distributed to David M. Reese, in accordance with the intentions of decedent, Leonard Reese.”

### III. DISCUSSION

#### A. *Res Judicata and Collateral Estoppel Do Not Apply*

Steven contends the doctrines of res judicata and collateral estoppel apply to bar relitigation of the issues raised in the March 11, 2016, petition. “Res judicata’ describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) “Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding.” (*In re Marriage of Furie* (2017) 16 Cal.App.5th 816, 827-828; accord, *Shine v. Williams-Sonoma, Inc.* (2018) 23 Cal.App.5th 1070, 1076.)

Steven argues that the probate court erred when it permitted the parties to relitigate “issues that have been decided in this case at both the trial court and appellate court levels.” In

Steven's view, the issue of whether there was a "failed transfer" within the meaning of section 21111, subdivision (a)(3)<sup>5</sup> has already been adjudicated as expressed in paragraphs 4 and 5 of the probate court's April 9, 2015, order. Steven's argument, however, ignores that in the prior appeal, we reversed the portion of the probate court's order that found the Iroquois property failed to transfer and therefore passed by intestacy. Indeed, we concluded that the probate court had acted in excess of its jurisdiction in making this finding as David had sought "only a determination as to whether the Iroquois property [was] a part of the trust." (*Reese v. Reese, supra*, B264733.) We further expressed "no opinion as to how the Iroquois property should be distributed." (*Ibid.*)

Steven accurately notes that we affirmed paragraphs 4 and 5 of the probate court's prior judgment. Those paragraphs provided that:

"4. The Declaration of Trust does not address how real property will be distributed.

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<sup>5</sup> Section 21111 provides in pertinent part: "(a) Except as provided in subdivision (b) and subject to Section 21110, if a transfer fails for any reason, the property is transferred as follows: [¶] (1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument. [¶] (2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument. [¶] (3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, or if the transfer is itself a residuary gift, the property is transferred to the decedent's estate."

“5. The Declaration of Trust does not have a residuary clause.”

To the extent Steven interprets our affirmance of paragraphs 4 and 5 as an affirmance of the probate court’s conclusion that the trust transfer failed and thus should be distributed under section 21111, subdivision (a)(3), such an interpretation is unreasonable as it directly contradicts our reversal of paragraph 6, which stated, “Since the Declaration of Trust does not address how real property will be distributed And [sic] does not have a residuary clause, the Iroquois property is transferred to the decedent’s estate.” (*Reese v. Reese, supra*, B264733.) The doctrines of res judicata and collateral estoppel apply only when there is a final judgment or order that resolved an issue or claim, and that said issue or claim is being relitigated in a subsequent proceeding. (*Mycogen Corp. v. Monsanto Co., supra*, 28 Cal.4th at pp. 896-897; *In re Marriage of Furie, supra*, 16 Cal.App.5th at pp. 827-828.) Here, we expressly reversed the probate court’s prior determination that the property should be distributed to the estate, and thus no final judgment or order has resolved that matter.

Paragraphs 4 and 5, fairly interpreted, are statements of fact that the Trust failed to state how real property would be distributed and also omitted a residuary clause. Those findings were uncontroversial, as they were based on the plain language of the Trust. Indeed, it was these omissions that caused David to petition the court for construction of the Trust. Res judicata and collateral estoppel thus do not require reversal here.

B. *Trial Court Did Not Err in Applying Duke*

Steven next contends that the probate court erred by applying *Duke, supra*, 61 Cal.4th 871, retroactively to David's April 1, 2014, petition. According to Steven, because *Duke* was decided after the probate court's April 9, 2015, judgment, and years after Leonard drafted his donative instruments, the probate court erred in relying on it in constructing the Trust. This argument is without merit.

"The general rule that judicial decisions are given retroactive effect is basic in our legal traditions. . . . '[T]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.' (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79 . . . )" (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978-979.) Although there are exceptions to this general principle, "[e]xceptions have been rare and we . . . find no reason to add to that short list in this case." (*Id.* at p. 979.) Accordingly, we find no error on this ground.<sup>6</sup>

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<sup>6</sup> Steven's argument that *Duke supra*, 61 Cal.4th 871, established a new rule of law applicable to this case is incorrect. The holding in *Duke* that Steven asserts, i.e., admissibility of extrinsic evidence to correct errors in trusts, was already in effect at the time either of David's petitions were filed. (See, e.g., *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1603-1604; *Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 368-369; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 82.) *Duke* thus did not enact a change to a settled rule of law relied upon by the parties.

C. *Steven Forfeited Arguments Concerning Revocation or Modification of the Trust; Even if not Forfeited, Substantial Evidence Supports the Order*

Steven contends the probate court erred by ordering distribution of the property to David because: (1) Leonard had revoked or modified the Trust via the January 2010, handwritten note; and (2) David breached his fiduciary duty as trustee by failing to comply with the note by immediately selling the property, which failure also constituted a conflict of interest. Steven, citing *Duke, supra*, 61 Cal.4th 871, contends that he should be allowed to rely upon the handwritten note as extrinsic evidence that Leonard intended to revoke or modify the Trust's terms. His argument is unavailing as he did not raise these arguments before the probate court. They are therefore forfeited. (*Araiza v. YOUNKIN* (2010) 188 Cal.App.4th 1120, 1126, fn. 3, & 1127.)<sup>7</sup>

Even if we were to consider the merits of Steven's arguments, he would not prevail. On appeal, we affirm the

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<sup>7</sup> Steven also fails to articulate why his argument entitles him to relief. Steven as the appellant bears the burden of demonstrating error. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609). While Steven alleges a breach of fiduciary duty, he fails to explain how any purported breach by David prejudiced him as he was not a beneficiary of the Trust. (See *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395 [elements for breach of fiduciary duty are existence of fiduciary duty, its breach, and damage caused by said breach].) Nor does Steven argue that David breached his fiduciary duty to Leonard and in any event the record does not demonstrate David was the trustee while Leonard was alive and the primary beneficiary.

probate court's factual findings if supported by substantial evidence. (*Orange Catholic Foundation v. Arvizu* (2018) 28 Cal.App.5th 283, 292.) “In assessing whether any substantial evidence exists, we view the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor.’ [Citation.] “[I]t is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it.” [Citation.] Where multiple inferences can be drawn from the evidence, we defer to the trial court’s findings.” (*Ibid.*)

Substantial evidence supports the probate court’s order. Both David and Dennis testified that Leonard intended for David to receive all of the Trust property. The court found the testimony of David and Dennis to be credible, which was further buttressed by Steven failing to present evidence to contradict them. Steven is effectively asking this court to reweigh the evidence, which is beyond the scope of appellate review. (*Orange Catholic Foundation v. Arvizu, supra*, 28 Cal.App.5th at p. 292.) Accordingly, we find no error on this ground.

#### **IV. DISPOSITION**

The order is affirmed. David M. Reese is entitled to recover his costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.